

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MARZITA AGUILAR, ESTREBERTO AVINA, )	2:09-CV-01416-ECR-PAL
Plaintiffs, )	
vs. )	<b><u>Order</u></b>
WMC MORTGAGE CORPORATION, et. al., )	
Defendants. )	

Plaintiffs in this case are homeowners who are in danger of losing their property in Las Vegas, Nevada, through foreclosure. The only remaining Defendant in the case is the original lender on Plaintiffs' home loan, WMC Mortgage Corporation ("WMC").

Now pending is WMC's Motion (#6) to Dismiss. Plaintiffs opposed (#11) the Motion to Dismiss (#6), and WMC replied (#19). The motion is ripe, and we now rule on it.

**I. Factual and Procedural Background**

On April 13, 2006, Plaintiffs purchased a home in Las Vegas, Nevada, using borrowed funds. (Compl. ¶ 8 (#1).) WMC was the originating lender. (Id. ¶ 10 (#1).) Plaintiffs became delinquent on their mortgage payments. (Id. ¶ 14 (#1).) On March 31, 2009, Fidelity National Default filed a Notice of Default and Election to Sell with the County Recorder's Office. (Id. ¶ 14 (#1).)

1 Plaintiffs' Complaint was filed in Nevada state court on June  
2 10, 2009. Plaintiff named four Defendants in the Complaint - WMC,  
3 Wells Fargo Bank NA, Fidelity National Title Agency of Nevada, Inc.  
4 and Fidelity National Default Solutions. Defendants removed the  
5 action on August 3, 2009, invoking this Court's federal question  
6 jurisdiction. (Notice of Removal (#1).)

7 The parties have stipulated (## 10, 23 and 28) to the dismissal  
8 of Wells Fargo Bank NA, Fidelity National Title Agency of Nevada,  
9 Inc. and Fidelity National Default Solutions. We approved (## 12,  
10 24 and 19) the stipulations. On August 13, 2009, WMC - the only  
11 remaining Defendant in the case - filed a Motion (#6) to Dismiss.  
12 On August 25, 2009, Plaintiffs responded (#11). On September 8,  
13 2009, WMC replied (#19).

## 14 15 **II. Motion to Dismiss Standard**

16 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be  
17 granted if the complaint fails to "state a claim to relief that is  
18 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
19 570 (2007). On a motion to dismiss, "we presum[e] that general  
20 allegations embrace those specific facts that are necessary to  
21 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,  
22 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889  
23 (1990)) (alteration in original). Moreover, "[a]ll allegations of  
24 material fact in the complaint are taken as true and construed in  
25 the light most favorable to the non-moving party." In re Stac  
26 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation  
27 omitted).

1 Although courts generally assume the facts alleged are true,  
2 courts do not "assume the truth of legal conclusions merely because  
3 they are cast in the form of factual allegations." W. Mining  
4 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
5 "[c]onclusory allegations and unwarranted inferences are  
6 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89  
7 F.3d at 1403 (citation omitted).

8 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is  
9 normally limited to the complaint itself. See Lee v. City of L.A.,  
10 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on  
11 materials outside the pleadings in making its ruling, it must treat  
12 the motion to dismiss as one for summary judgment and give the non-  
13 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);  
14 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A  
15 court may, however, consider certain materials – documents attached  
16 to the complaint, documents incorporated by reference in the  
17 complaint, or matters of judicial notice – without converting the  
18 motion to dismiss into a motion for summary judgment." Ritchie, 342  
19 F.3d at 908.

20 If documents are physically attached to the complaint, then a  
21 court may consider them if their "authenticity is not contested" and  
22 "the plaintiff's complaint necessarily relies on them." Lee, 250  
23 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
24 A court may also treat certain documents as incorporated by  
25 reference into the plaintiff's complaint if the complaint "refers  
26 extensively to the document or the document forms the basis of the  
27 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if  
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1 adjudicative facts or matters of public record meet the requirements  
2 of Fed. R. Evid. 201, a court may judicially notice them in deciding  
3 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A  
4 judicially noticed fact must be one not subject to reasonable  
5 dispute in that it is either (1) generally known within the  
6 territorial jurisdiction of the trial court or (2) capable of  
7 accurate and ready determination by resort to sources whose accuracy  
8 cannot reasonably be questioned.").

### 10 III. Analysis

#### 11 **A. Wrongful Foreclosure**

12 Plaintiffs' claim that the foreclosure on their home is  
13 wrongful rests primarily on the argument that Defendants have no  
14 right to foreclose upon their property because they have not  
15 produced the original note to prove the identity of the real party  
16 in interest. An action for the tort of wrongful foreclosure will  
17 lie only "if the trustor or mortgagor can establish that at the time  
18 the power of sale was exercised or the foreclosure occurred, no  
19 breach of condition or failure of performance existed on the  
20 mortgagor's or trustor's part which would have authorized the  
21 foreclosure or exercise of the power of sale." Collins v. Union  
22 Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983). The  
23 "material issue of fact in a wrongful foreclosure claim is whether  
24 the trustor was in default when the power of sale was exercised."  
25 Id.

26 Plaintiffs admit that they were delinquent on their mortgage  
27 payments. (Id. ¶ 14 (#1).) Moreover, Nevada's foreclosure statute

1 is comprehensive and does not require production of the original  
2 note. See NEV. REV. STAT. § 107.080. Plaintiffs have thus failed to  
3 state a claim for wrongful foreclosure.

4 **B. RESPA**

5 Plaintiffs' second claim for relief alleges that Defendants  
6 violated the Real Estate Settlement Procedures Act ("RESPA"), 12  
7 U.S.C. §§ 2601-2617. The alleged conduct underlying this claim is  
8 as follows: "The Mortgage Loan was sold, transferred and/or assigned  
9 without advising Plaintiffs"; "Defendants did not accurately  
10 disclose the settlement costs and the monthly costs and payment  
11 amount to the Plaintiffs" and; "When Plaintiffs elect to make a  
12 [Qualified Written Request] and other documents relating to the  
13 Mortgage Loan and to this date, the Defendants must produce the Note  
14 or provide proof of ownership." (Compl. §§ 29-31 (#1).) Plaintiffs  
15 do not cite to any specific RESPA provision that was allegedly  
16 violated by such conduct.

17 RESPA requires that "[i]f any servicer of a federally related  
18 mortgage loan receives a qualified written request from the borrower  
19 (or an agent of the borrower) for information relating to the  
20 servicing of such loan, the servicer shall provide a written  
21 response acknowledging receipt of the correspondence within 20 days  
22 . . . unless the action requested is taken within such period." 12  
23 U.S.C. § 2605(e)(1)(A). With respect to Plaintiffs' allegation  
24 regarding a Qualified Written Request ("QWR"), Plaintiffs do not  
25 allege to whom specifically Plaintiff made a QWR, when such a  
26 request was made, how Defendants failed to respond to the request,  
27 if the 20 day statutory period for response has lapsed, or how WMC

1 meets the statutory definition of a "servicer." See Delino v.  
2 Platinum Cmty. Bank, 628 F. Supp. 2d 1226, 1232 (S.D. Cal.  
3 2009) (dismissing a plaintiff's RESPA claims on such grounds).  
4 Moreover, Plaintiffs allegation that "[w]hen Plaintiffs elect to  
5 make a QWR and other documents relating to the Mortgage Loan and to  
6 this date, the Defendants must produce the Note or provide proof of  
7 ownership," (Compl. ¶ 31 (#1)), is not only too vague to survive a  
8 motion to dismiss, it is virtually incomprehensible, and thus fails  
9 to put QWC on sufficient notice of alleged wrongdoing.

10 RESPA also provides that "[e]ach servicer of any federally  
11 related mortgage loan shall notify the borrower in writing of any  
12 assignment, sale, or transfer of the servicing of the loan to any  
13 other person." 12 U.S.C. § 2605(b)(1). "Servicer" is defined in  
14 the statute as, "the person responsible for servicing of a loan  
15 (including the person who makes or holds a loan if such person also  
16 services the loan)." 12 U.S.C. § 2605(i)(2). Plaintiff fails to  
17 state a claim under 12 U.S.C. § 2605(b)(1) for failure to notify of  
18 transfer, sale or assignment. Plaintiffs do not allege when any  
19 such alleged transfer, sale or assignment took place, or what  
20 entities were involved and therefore had the duty to notify. See  
21 Delino, 628 F. Supp. 2d at 1232.

22 Finally, Plaintiffs' claim regarding Defendants' failure to  
23 disclose settlement costs, payment amounts and monthly costs also  
24 fails. The part of RESPA on which we presume Plaintiff relies is  
25 section 2603. Under section 2603, the lender must complete and make  
26 available to the borrower either before or at settlement a uniform  
27 settlement statement reflecting the actual settlement costs. 12  
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1 U.S.C. § 2603(b). There is no private right of action for claims  
2 arising under section 2603 of RESPA. See Bloom v. Martin, 865 F.  
3 Supp. 1377, 1384 (N.D. Cal. 1994) (so stating). Plaintiffs second  
4 claim for relief thus fails, and will be dismissed.

5 **C. Truth in Lending Act**

6 Plaintiffs allege that Defendants violated the Truth in Lending  
7 Act (TILA), 55 U.S.C. §§ 1601-1667(f), by failing to disclose  
8 material terms of their loan and misrepresenting certain loan terms.  
9 Defendants contend that plaintiffs' TILA claim is barred by the  
10 statute of limitations.

11 TILA provides a one-year statute of limitations for claims for  
12 civil damages and a three-year limitations period for claims for  
13 rescission. 15 U.S.C. § 1640(e); Id §§ 1635(a) and (f).  
14 Plaintiffs' claim is governed by TILA's statute of limitations.  
15 Plaintiffs' TILA claim arose upon the execution of loan documents on  
16 or about April 13, 2006. The statute of limitations on Plaintiffs'  
17 claim for damages would thus have expired on April 13, 2007; their  
18 claim for rescission would have expired on April 13, 2009.  
19 Plaintiffs did not file this action until June 30, 2009. Thus, the  
20 claim is time-barred, unless the statute of limitations was tolled.

21 The Ninth Circuit has held that equitable tolling of claims for  
22 damages under TILA may be appropriate "in certain circumstances,"  
23 and can operate to "suspend the limitations period until the  
24 borrower discovers or had reasonable opportunity to discover the  
25 fraud or non-disclosures that form the basis of the TILA action."  
26 King v. California, 784 F.2d 910, 914-15 (9th Cir. 1986). District  
27 courts have discretion to evaluate specific claims of fraudulent  
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1 concealment and equitable tolling and "to adjust the limitations  
2 period accordingly." Id. at 915. "Because the applicability of the  
3 equitable tolling doctrine often depends on matters outside the  
4 pleadings, it "is not generally amenable to resolution on a Rule  
5 12(b)(6) motion." Supermail Cargo, Inc. v. United States, 68 F.3d  
6 1204, 1206 (9th Cir. 1995). When, however, a plaintiff does not  
7 allege any facts demonstrating that he or she could not have  
8 discovered the alleged violations by exercising due diligence,  
9 dismissal may be appropriate. See Meyer v. Ameriquest Mortgage Co.,  
10 342 F.3d 899, 902-03 (9th Cir. 2003) (refusing to toll statute of  
11 limitations on TILA claim because plaintiff was in full possession  
12 of all loan documents and did not allege any concealment of loan  
13 documents or other action that would have prevented discovery of the  
14 alleged TILA violations).

15 Here, Plaintiffs fail to allege that Defendants concealed  
16 anything so as to prevent Plaintiffs from discovering any potential  
17 TILA claims. As such, Plaintiffs are not entitled to equitable  
18 tolling of their TILA damages claim. See Meyer, 342 F.3d at 902-03.  
19 Accordingly, we conclude that dismissal of Plaintiffs' TILA claim  
20 for damages is appropriate.

21 **D. Rescission and Declaratory Relief**

22 Plaintiffs' fourth claim for relief seeks rescission and  
23 declaratory relief. Rescission and declaratory relief are equitable  
24 remedies and not independent causes of action. Because we dismiss  
25 the substantive claims underlying Plaintiffs' request for equitable  
26 relief, we need not address Plaintiffs' request for rescission and  
27 declaratory relief independently.



1        Nevertheless, as discussed above, to the extent that  
 2 Plaintiffs' request for rescission is premised on the alleged TILA  
 3 violation, the request is time-barred.

4        **E. Unfair Lending Practices**

5        Plaintiffs obtained the loan at issue in this case on April 13,  
 6 2006. Plaintiffs allege that Defendants violated Nev. Rev. Stat. §  
 7 598D.100 because they "knowingly and intentionally made the Mortgage  
 8 Loan to the Plaintiffs based solely on the Plaintiffs' equity in the  
 9 Subject Property and without determining that the Plaintiffs had the  
 10 ability to repay the Mortgage Loan from other assets, including,  
 11 without limitation, Plaintiffs' income." (Compl. ¶ 50 (#1).)

12        1. The 2007 Amendments to Nev. Rev. Stat. § 598D.100

13        The Nevada Legislature adopted Assembly Bill 440 during the  
 14 2007 session, which amended Nev. Rev. Stat. Chapter 598D, effective  
 15 October 1, 2007. The bill, inter alia, redefined the scope of "home  
 16 loan[s]" subject to the chapter's provisions. See A.B. 440, Section  
 17 2, 2007 Nev. Stat. 2846 (" AB 440 "). The definition of "home loan"  
 18 in the pre-amendment version of Nev. Rev. Stat. ¶ 598D.040 was as  
 19 follows:

20        "Home loan" means a consumer credit transaction that 1. Is  
 21 secured by a mortgage loan which involves real property  
 22 located within this State; and 2. Constitutes a mortgage  
 23 under § 152 of the Home Ownership and Equity Protection Act  
 24 of 1994, 15 U.S.C. § 1602(aa), and the regulations adopted  
 by the Board of Governors of the Federal Reserve System  
 pursuant thereto, including, without limitation, 12 C.F.R.  
 § 226.32.

25 NEV. REV. STAT. ¶ 598D.040 (2006).

26        The 2007 legislation redefined the operative term "home loan,"  
 27 inserting a second "without limitation" before the clause about the

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1 Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. §  
2 1602(aa), and the regulations adopted by the Board of Governors:

3 "Home loan" means a consumer credit transaction that is  
4 secured by a mortgage loan which involves real property  
5 located within this State and includes, without limitation,  
6 a consumer credit transaction that constitutes a mortgage  
7 under § 152 of the Home Ownership and Equity Protection Act  
of 1994, 15 U.S.C. § 1602(aa), and the regulations adopted  
by the Board of Governors of the Federal Reserve System  
pursuant thereto, including, without limitation, 12 C.F.R.  
§ 226.32.

8  
9 NEV. REV. STAT. § 598D.040 (2008)

10 In other words, though the post-amendment version is more  
11 expansive, the pre-amendment version of Nev. Rev. Stat. Chapter 598D  
12 regulated only those home loans that constituted mortgages under  
13 HOEPA, 15 U.S.C. § 1602(aa), and the regulations adopted by the  
14 Board of Governors of the Federal Reserve System.

15 15 U.S.C. § 1602(aa)'s definition of mortgage excludes  
16 residential mortgage transactions. 15 U.S.C. § 1602(aa)(1).  
17 Residential mortgage transactions are transactions "in which a  
18 mortgage, deed of trust, purchase money security interest arising  
19 under an installment sales contract, or equivalent consensual  
20 security interest is created or retained against the consumer's  
21 dwelling to finance the acquisition or initial construction of such  
22 dwelling." 15 U.S.C. § 1602(w). Because the loan at issue in this  
23 case qualifies as a residential mortgage transaction, it was not  
24 regulated by Nev. Rev. Stat. § 598D. Thus, the pre-amendment  
25 version of the statute cannot apply to Plaintiffs' home loan.

26 The post-amendment version is more expansive, effectively  
27 covering any home loan for property located in Nevada. However,

1 section 598D as amended lacks any provision for its retroactive  
2 application, and civil statutes are normally presumed to operate  
3 only prospectively. United States v. Perry, 431 F.2d 1020, 1023  
4 (9th Cir. 1970). The broader post-amendment language is therefore  
5 only applicable to loans issued after October 1, 2007.

6 The Complaint thus fails to state a claim under the Unfair  
7 Lending Act because Plaintiffs obtained the loan at issue on April  
8 13, 2006, and the version of Nev. Rev. Stat. § 598D.040 in force at  
9 that time excluded from its coverage Plaintiffs' loan.

10 **F. Breach of Contract**

11 Plaintiffs' fifth claim for relief is breach of contract.  
12 Plaintiffs' allegations under this claim are conclusory and vague.  
13 The only fact alleged with respect to this claim is related to  
14 Defendants' conduct during the loan application process, before any  
15 contract was entered into between the parties. Plaintiffs do not  
16 allege what contract is at issue, nor do they identify what  
17 provisions of that contract were breached or how. Plaintiffs' fifth  
18 claim for relief does not provide sufficient notice to WMC and  
19 cannot survive a motion to dismiss.

20 **G. Breach of Covenant of Good Faith and Fair Dealing**

21 In every contract, there is an implied covenant of good faith  
22 and fair dealing: "When one party performs a contract in a manner  
23 that is unfaithful to the purpose of the contract and the justified  
24 expectations of the other party are thus denied, damages may be  
25 awarded against the party who does not act in good faith." Hilton  
26 Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919, 923 (Nev.  
27 1991). A breach of the covenant occurs "[w]here the terms of a  
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1 contract are literally complied with but one party to the contract  
2 deliberately contravenes the intention and spirit of the  
3 contract . . . .” Id. at 922-23

4 Plaintiffs bring a claim for breach of the implied covenant of  
5 good faith and fair dealing. Plaintiffs do not, however, allege a  
6 single fact that would establish that the manner in which Defendants  
7 complied with the contracts at issue – apparently the Deed of Trust  
8 and Promissory Note – contravened the intention or spirit of the  
9 contracts. Thus, Plaintiffs’ claim for breach of the implied  
10 covenant of good faith and fair dealing will be dismissed.

#### 11 12 **IV. Leave to Amend**

13 Under Rule 15(a) leave to amend is to be “freely given when  
14 justice so requires.” In general, amendment should be allowed with  
15 “extreme liberality.” Owens v. Kaiser Found. Health Plan, Inc., 244  
16 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission  
17 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors  
18 such as undue delay, bad faith, dilatory motive, undue prejudice or  
19 futility of amendment are present, leave to amend may properly be  
20 denied in the district court’s discretion. Eminence Capital, LLC v.  
21 Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003).

22 In light of the liberal spirit of Rule 15(a), Plaintiffs should  
23 have an opportunity to amend their complaint. There is no reason  
24 why Plaintiffs could not cure the deficiencies we have noted here,  
25 or at least some of them, such as the conclusory and vague  
26 allegations against undifferentiated defendants. Should Plaintiffs  
27 choose to do so, however, they shall plead facts, as opposed to

1 legal conclusions. If the amended complaint is similarly deficient,  
2 we may be forced to conclude that leave to further amend would be  
3 futile.

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5 **V. Conclusion**

6 Plaintiffs have failed to state a claim upon which relief could  
7 be granted. Plaintiffs will be given leave to amend. Should they  
8 choose to do so, however, they shall plead facts, not legal  
9 conclusions.

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11 **IT IS THEREFORE HEREBY ORDERED THAT** Defendant's Motion to  
12 Dismiss (#6) is **GRANTED**. Plaintiffs shall have 21 days within which  
13 to file an amended complaint.

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15 DATED: January 15, 2010.

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17 UNITED STATES DISTRICT JUDGE  
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